

PRICE FIXING AND CARTEL MATTERS

This quarter saw a record penalty imposed for price fixing behaviour by the Visy Group and its prominent owner/ director, Mr Richard Pratt. This was not the only cartel exposed over the period, and in this edition we look at a range of similar cases from a variety of markets.

The box cartel

On 2 November the Federal Court found that Visy Board Pty Ltd had engaged in price-fixing and market-sharing contraventions with its rival, Amcor Limited. Penalties imposed on Visy and its officers, plus legal costs, mean the bill – over \$40 million – has set a record.

The record penalties followed a settlement agreement between the ACCC, Visy and the individual respondents.

Justice Heerey found the record penalties are "reflective of the fact that this must be, by far, the most serious cartel case to come before the Court in the 30 plus years in which price fixing has been prohibited by statute." He went on to say that "Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case, therefore, had the potential for the widest possible effect".

How good is your advice? (1): Victorian abalone cartel

While the Visy matter was an instance of conduct that participants knew to be wrong, similar behaviour by abalone quota holders in Victoria had a somewhat different character.

In this matter, penalties totalling \$927,500 were imposed on 19 parties involved in a Victorian abalone cartel. The ACCC had alleged an arrangement for collective action about the pricing and provision of abalone harvested from the central abalone fishery zone in Victoria by eight abalone quota holders.

Under the arrangement the parties would not supply a processor customer unless that processor paid a premium on top of an average 'beach' price (market price) and was a processor nominated by Australian Abalone Pty Ltd.

The arrangement provided for penalties if a quota holder supplied outside the arrangement. The Federal Court found that the conduct contravened the primary boycott and price fixing provisions of the Act.

An interesting feature of the case was that a number of lawyers and accountants had "cast their eyes over the relevant documents, and failed to detect a possible breach." There was no attempt to conceal the arrangement.

Justice Weinberg noted that Australian Abalone did not make any significant profit from the arrangement; it was short lived; and that the parties were unaware they might be contravening the law. But as he also stated: "the respondents had a responsibility to ensure that they knew the law, and that the law was obeyed."

How good is your advice? (2): Tasmanian orthodontists

Poor advice also featured in a matter involving three orthodontic businesses in northern Tasmania. Here the respondent orthodontists, in various combinations, entered into arrangements to:

- fix the price of the orthodontic services they each provided
- restrict their respective supply of orthodontic services to new patients when an orthodontist had more customers than the others
- restrict the ability of the orthodontists to supply services from separate premises or work with other orthodontists near the existing practices; and
- stop another orthodontist from setting-up a competing practice in northern Tasmania.

Tas orthodontists (continued)

Such behaviour clearly amounts to price fixing and market sharing, as the Court found. But as it also heard, the co-location agreement containing the illegal clauses was drafted by a lawyer in 1992 and the orthodontists relied on that lawyer's legal advice. Moreover, another orthodontist who joined the co location agreement at a later date had sought his own legal advice: the lawyer in that instance also failed to identify the illegal clauses.

In light of the repeatedly faulty legal advice received by the orthodontists and because the respondents cooperated with the investigation, the ACCC took the unusual step of not seeking a monetary penalty. The court confirmed the ACCC's position.

RESALE PRICE MAINTENANCE

Widely misreported in the media as "price fixing" behaviour, resale price maintenance ("RPM") occurs when a supplier of goods or services attempts to tell resellers what to charge – usually with a view to preventing them from offering discounts. This quarter saw three RPM cases concluded.

Navman

On 21 December the Federal Court imposed a penalty of \$1.25 million on Navman Australia Pty Ltd, and penalties of \$80 000 and \$30 000 respectively on a former director of Navman and the company's former Australasian sales manager. The orders were made with the consent of the parties.

Navman is a supplier of marine, personal and in car navigational equipment and has dealership and retail arrangements across Australia. Navman admitted that in regard to its marine products, it sought to ensure that dealers did not sell below the benchmark which it used for the pricing of its marine products. Navman had actually cut off supply to some retailers.

In relation to its Personal Computer Navigation products, Navman particularly sought to prevent discounting below specified prices by retailers via the internet. Some of the language used by the former director was quite colourful: for example, he wrote in an email "There is only one issue that will stop Navman and that's discounting!! I will not allow our great products to be prostituted - take the warning now!"

A follow-up email said: "If you can't sell our products without discounting, then I suggest it's time to sell any of our competitors' products - simple as that!!"

ACCC Chairman, Mr Graeme Samuel, observed that "Businesses must be free to sell their products at prices below suppliers' recommended retail prices.

"When buying items ... consumers like to shop around (including over the internet) in order to get the best deal. This encourages businesses to compete on price and, by taking advantage of this competition, enables consumers to buy at lower prices. Price competition is fundamental to competitive markets and this behaviour does nothing but fetter this competitive process ... if [suppliers] attempt

to impose a benchmark price, or stop resellers discounting their products, they run a significant risk of breaching the Trade Practices Act, and the penalty for that may be severe."

Electronic goods

TEAC Australia Pty Ltd and its National Sales Manager, received penalties totalling \$190,000 on 28 November, for engaging in RPM.

The ACCC had instituted proceedings against TEAC in relation to conduct that sought to stop an independent retailer of electronic products from advertising prices below the 'go price' specified by TEAC.

The ACCC and TEAC submitted agreed declarations, penalty figures and other orders for consideration by the court.

Justice Kenny noted: "The respondents have co-operated with the ACCC...acknowledged their liability at the earliest stage..." and "...these are mitigating factors that result in a substantial discount from the penalties that would otherwise be appropriate."

Bicycles

Penalties were imposed on Netti Atom Pty Ltd and its National Sales Manager for RPM following ACCC action. Netti imports and distributes bicycles and bicycle accessories, including Scott bikes. Justice Finkelstein of the Federal Court, Melbourne ordered Netti to pay \$110,000 and the National Sales Manager \$11,250 for being knowingly concerned in the conduct.

SECONDARY BOYCOTT

CFMEU & Bovis Lend Lease

In Edition 23 we reported on ACCC action against the Construction Forestry Mining and Energy Union (CFMEU), Bovis Lend Lease Limited and two individuals for allegedly engaging in conduct leading to a secondary boycott [TPA s. 45E(3)].

On 2 October, a penalty of \$100,000 was imposed on Bovis Lend Lease. In a statement of agreed facts, the ACCC and Bovis agreed that Bovis had terminated a contract because of an arrangement or understanding with the CFMEU that it had to cease acquiring a contractor's services at a site; if not, the CFMEU would not continue negotiations with Bovis on a national enterprise agreement.

This decision does not conclude the matter. Justice Gyles heard the case against Bovis based on Bovis' admissions and independently of the ACCC's contested case against the CFMEU, and the individual union respondents. The case against the union respondents was heard by a different judge (Finn J) whose judgment is pending. Justice Gyles' findings do not determine the outcome of the contested proceedings against the union respondents, which must be determined on facts found independently by Justice Finn.

TPA section 45E(3) prevents a person entering into a contract, arrangement or understanding with an organisation of employees for a purpose of preventing or hindering that first person from acquiring or continuing to acquire goods or services from a second person.

ACCC ENFORCEMENT SNIPPETS – PART V

Green marketing - energy

The ACCC took steps in December to address what it saw as potentially misleading conduct by two electricity businesses in the often confusing area of "green energy". These actions are a reminder of the risks associated with claims of environmental benefit and/or responsibility, which have clear and increasing relevance to councils and their communities.

1. *Origin Energy*

Origin aired a television advertisement in Victoria and Adelaide representing that switching to Origin GreenPower would be the same as 'not driving your car for two years'. The advertisement featured a spider in the exhaust of a disused car.

The ACCC was concerned that the advertisement did not clearly explain to consumers the 'underlying averaging' basis for the claimed environmental benefit of switching to Origin 100% GreenPower. It was also concerned that consumers were not adequately informed in the advertisement that there was a choice of two Origin GreenPower products, and that choosing the 20% rather than 100% product would not achieve the same result.

Origin responded promptly, agreeing not to air such advertisements in the future without making explicit the basis upon which the representations are made. The company also agreed to educate its customers, through its newsletters, about the basis of the environmental claims it makes.

Origin will also send a clarification letter to GreenPower customers who signed up during the period that the advertisement was being broadcast, and allow those who did not understand the advertisement to switch from those products without cost or delay.

2. *EnergyAustralia ("EA")*

A complaint from the Total Environment Centre caused the ACCC to look at representations that EA's *ClearAir* and *GreenFuture* products would provide '100% green electricity at no extra cost' and '100% renewable energy'. A related representation was that 'for every kilowatt hour of electricity you buy, the same amount of electricity will be generated from 100% renewable sources, and that's guaranteed'.

EA's representations may have led consumers to believe that by signing up to these non-accredited products, they would be making equal or similar contributions to renewable energy generation as accredited renewable energy products; but this was not the case. Consumers may also have believed that one environmental benefit of opting to receive these products was that less electricity would be generated from fossil fuels. In reality EA was acquiring renewable energy credits from existing rather than new renewable energy generation.

Whilst EA has not admitted that its conduct constituted a contravention of the Act, it has acknowledged that its representations may have confused some consumers. Accordingly, EA has agreed to a range of measures to reduce the level of confusion in the market.

Stores Online: more issues

Readers may recall our coverage of action against Stores Online, and its refunds to purchasers, in Edition 23. We mentioned then that no restrictions had been placed on the company's activities, and that Consumer Affairs Victoria director David Cousins had warned consumers to be wary of the company and its products.

The first of a number of fresh ACCC actions against the company commenced on 5 October. The ACCC alleged that StoresOnline contravened its earlier s.87B undertaking in various ways and on numerous occasions during the course of further presentations. One of the orders sought by the ACCC was an interlocutory injunction restraining StoresOnline from conducting presentations scheduled for October 2007.

On 22 October the Federal Court declined to grant the interlocutory injunction. But the workshops were permitted to continue only subject to a number of court orders designed to protect consumers.

Justice Tamberlin did find that StoresOnline had breached the s.87B undertaking on a number of occasions in conduct at earlier workshops. In particular, he found that StoresOnline had breached its obligation to make the three business day cooling off period known. He found that some of the StoresOnline written disclaimers were "manifestly inadequate".

On 30 October Justice Tamberlin ordered StoresOnline to amend their workshop presenta-

tions and further workshops via specified statements and disclaimers until final hearing of the matter. He ordered the disclaimers to be made by oral statements and by a written display on a screen at the commencement of and following the lunch break at all workshop presentations.

Finally, on November 30, the ACCC amended its claims to include two new allegations of false or misleading conduct. It now alleges that since October 2006, StoresOnline has made false or misleading representations to Australian customers about the price of its e-commerce software packages.

The ACCC alleges that the company offered for sale e-commerce packages at a price known as the "Workshop Only Offer Price". This was represented as being a discounted price compared to the "Full Price" and the "90 Day Offer Price". But the ACCC alleges that the packages have never previously been sold or offered for sale at the Full Price or the 90 Day Offer Price in Australia, and thus the level of saving representation was false.

Justice Tamberlin has set a timetable for the future conduct of the litigation.

Telstra Next G: misleading

The Federal Court has confirmed that Telstra misled consumers about the coverage available on its Next G mobile network. The ACCC brought proceedings against Telstra in September, alleging that Telstra had engaged in misleading or deceptive conduct by representing that the Next G

mobile network had "coverage everywhere you need it" and that Next G customers would get the same or better coverage as they did on the CDMA network.

In mid July Telstra introduced a "Blue Tick" program to rate handset performance. Justice Gordon held this "demonstrates the misleading and deceptive character" of the earlier advertisements. Telstra continued to run advertisements for Next G without explaining the differences between handsets.

She also found that Telstra had misled consumers by representing that Next G coverage was the same as or better than CDMA coverage.

Relief orders have not yet been made. The ACCC will seek injunctions preventing further similar representations, and orders requiring Telstra to publish corrective advertisements.

Please direct queries about items in this publication to your Compliance Officer; or contact Greg d'Arville at **cgESSENTIALS**, on 0414 250025.

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